

Federal Court



Cour fédérale

Date: 20160205

Docket: IMM-3839-15

Citation: 2016 FC 144

Vancouver, British Columbia, February 5, 2016

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**FRANCISCO JAVIER MENDOZA
HERNANDEZ**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Francisco Javier Mendoza Hernandez, a 22 year-old citizen of Guatemala, seeks judicial review of the decision of the Refugee Protection Division of the Immigration Refugee Board of Canada (RPD), dated July 30, 2015. In its decision, the RPD concluded that the Applicant was not a Convention refugee pursuant to s 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA* or “the Act”) and is not a person in need of protection

pursuant to s 97 (1) of the Act. Further, pursuant to s 107 (2) of *IRPA*, the RPD found there was no credible basis for his claim.

[2] The issues in this application are whether the RPD's no credible basis finding and specific credibility findings were unreasonable and whether a breach of procedural fairness by the RPD was sufficiently material to require that the matter be sent back for reconsideration by a different Member.

[3] The parties agree and I accept that the appropriate standard of review of the RPD's findings on both credibility and no credible basis is reasonableness: *Pournaminivas v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1099, at para 5 [*Pournaminivas*]. There is also no controversy that the appropriate standard of review for questions of procedural fairness in this context is correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 50.

[4] The Applicant has a checkered immigration history. He entered the United States illegally in 2009 and was apprehended and incarcerated for a minor public order offense in 2011. He was subsequently deported but returned illegally in 2013 where he remained until October or November 2014. He then entered Canada without authorization and did not make a refugee claim until arrested for public drunkenness on May 9, 2015. The Applicant and his girlfriend then misled their first counsel about the time that they had been cohabiting with the intent to submit a common-law sponsorship application.

[5] Upon being interviewed by a CBSA officer on May 10, 2015, the Applicant stated that the basis for his refugee claim was that members of a gang wanted to kill him because a co-worker had “lots of enemies”. In an interview with another officer on May 11, 2015, the Applicant first stated he left Guatemala in May 2014 and then later recanted and said he left in 2013. At that point, he indicated that he was at risk because he had worked for certain religious leaders in Guatemala.

[6] The RPD found that the Applicant’s retelling of the allegations was inconsistent with an amended basis of claim form (BOC) filed June 23, 2015. In his initial interview Mr. Hernandez said, among other things, that his reason for being in Canada was to be with his spouse. The RPD drew a negative credibility assessment from that discrepancy and from other inconsistencies between the interviews with the two CBSA officers. The Applicant admitted that he lied in his interview with the first officer and stated that his reason was that he did not have a lawyer and was nervous. The RPD did not accept this explanation.

[7] The RPD found discrepancies in letters from the Applicant’s former employer, the Sacral Archbishop of the Guatemalan Mayan Orthodox Church, his aunt and sister, and drew negative credibility inferences from the inconsistencies and the lack of supporting documentary evidence. The affidavit of his spouse was given little weight as she acknowledged having lied, along with the Applicant, to an immigration counsel whom they approached to help them with his status.

[8] Two newspaper articles from 1988 and 1992, excerpts from a seminary blog and a national documentation package for Guatemala were also considered. The RPD drew a negative

credibility inference from the lack of documentary evidence on recent attacks or threats on other members of the Church, including its leaders. The RPD found that this also spoke to a lack of an objective basis for the claim. The only evidence linking the Applicant's allegation of an attack or threats to his work with the Church was his testimony.

[9] The RPD determined that there was no nexus upon which to find that the Applicant is a convention refugee. The risk that he may face in Guatemala is a generalized risk, not a risk to life or cruel and unusual punishment. The RPD determined that the Applicant was not credible and that the "credibility concerns are so serious as to destroy the claim." Given the serious credibility concerns, the RPD found that there was "no credible or trustworthy evidence on which I could have made a favorable decision" and, therefore, held that there was no credible basis for the Applicant's claim.

[10] A "no credible basis" finding carries serious consequences. If made, a claim is ineligible for review by the Refugee Appeal Division, and the claimant is not entitled to a statutory stay pending the outcome of any judicial review. Because of these consequences, the threshold for this finding is high, and the RPD must ensure that there is no credible or trustworthy evidence in support of the claim before arriving at that conclusion: *Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, paras 51-52.

[11] In my view, the RPD's finding that there was no credible basis for the claim was reasonable. The documentary evidence, assessed without the Applicant's testimony, was insufficient at law to establish a claim under s 96 of s 97 (1) of the Act. The objective country

documentation linking threats to the priests of the Church is more than 20 years old. It was open to the RPD to find that the letter from the Archbishop was insufficient to establish an objective basis for the Applicant's claim, and there was no other objective evidence of current threats to members of the Church. The only remaining evidence is the letters submitted by the Applicant's sister and aunt. The RPD did not specifically address this evidence but generally noted that there was a lack of objective, credible documentary evidence on the recent risk to staff of the Church.

[12] The letters from the aunt and the sister lacked key details to be sufficient to support the claim on their own, and the independent and objective documentary evidence did not support the existence of a current risk. Although the Father's letter was accepted, it alone was insufficient at law to establish a claim under the Act. Accordingly, it was reasonable for the RPD to make a no credible basis finding.

[13] This case is distinguishable from *Pournaminivas* (above), where Justice Boswell found it unreasonable for the RPD not to consider the substantial documentary evidence about the persecution of homosexuals in India, and the unchallenged testimony of one of the Applicant's witnesses.

[14] As for the specific adverse credibility findings, the RPD drew reasonable inferences from the lies that the Applicant told a CBSA officer and counsel, inconsistencies between the interviews and his amended BOC, the delay in claiming, and the lack of detail in his supporting letters. These findings did not suffer from microscopic analysis or exaggerate minute inconsistencies. The RPD took the Applicant's explanations into account, but they carried little

weight. Avoiding deportation is not a justification for lying, and the assessment of credibility lies at the heart of the RPD's responsibility.

[15] The breach of natural justice argument arises because the RPD cited the Applicant's failure to make a refugee claim in the United States in support of its decision.

[16] Midway through his submissions at the RPD hearing, counsel for the Applicant specifically sought clarification as to whether the Mr. Hernandez's failure to make a claim in the US remained an issue. The Presiding Member answered "no". As such, the Applicant submits that the RPD denied him the opportunity to make submissions on this issue.

[17] The Respondent acknowledges that the RPD erred by relying on the Applicant's failure to make a claim in the US in its assessment of his credibility. The Respondent argues that in cases where there has been a breach of natural justice the court retains the discretion not to grant a remedy where the result is nevertheless inevitable: *Mobile Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 pp 228-229; *Sketchley v Canada (AG)*, 2005 FCA 404, para 125.

[18] If notwithstanding the breach, it is apparent that the decision maker would have reached the same decision and by remitting it for reconsideration nothing would be achieved, the decision should stand. However, that will not apply where, at a fresh hearing, a new tribunal could arrive at a different conclusion on credibility: *Abasalizadeh v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1407, at para 24.

[19] The RPD's comments on the Applicant's failure to claim in the US appear in one of 22 paragraphs in the decision. The conclusion drawn at the end of that paragraph is an adverse credibility inference resulting from the Applicant's failure to make a refugee claim in *Canada* until detained by the police. That was the material issue and, in fact, what counsel turned to in his submissions when the RPD Member responded to his inquiry about the failure to claim in the US.

[20] When asked during the judicial review hearing what additional submissions could have been made on the Applicant's behalf about his failure to claim in the US, counsel suggested that reference may have been made to the Applicant's fear of being deported again due to his prior removal. That, in my view, would have made no difference to the outcome. Ultimately, even without addressing the Applicant's failure to claim in the US, the RPD had a sufficient basis to find that he was not credible.

[21] In the result, I am satisfied that the decision was reasonable and that the Applicant was not denied procedural fairness in the RPD's analysis and decision.

[22] No questions were proposed and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed
and no questions will be certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3839-15

STYLE OF CAUSE: FRANCISCO JAVIER MENDOZA HERNANDEZ v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JANUARY 28, 2016

JUDGMENT AND REASONS: MOSLEY J.

DATED: FEBRUARY 5, 2016

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